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*See page*

## TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 295

HENRY P. KEITH, LATE COLLECTOR OF UNITED STATES INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF NEW YORK, PETITIONER

vs.

EMMA B. JOHNSON, AS ADMINISTRATRIX OF THE GOODS, CHATTELS, AND CREDITS WHICH WERE OF JOHN B. JOHNSON, DECEASED

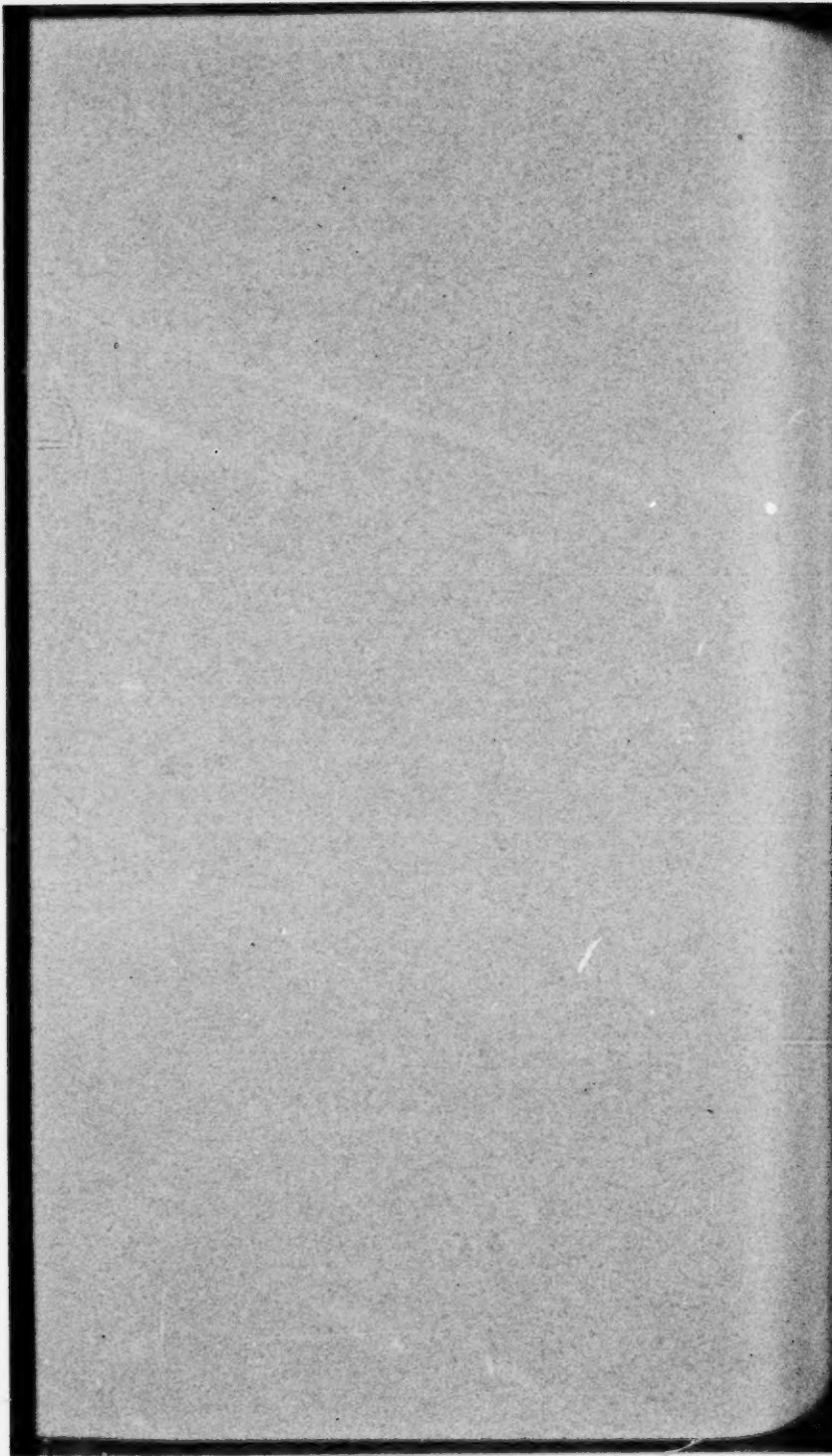
ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 24, 1926

CERTIORARI GRANTED MARCH 22, 1926

*See note*

(30896)



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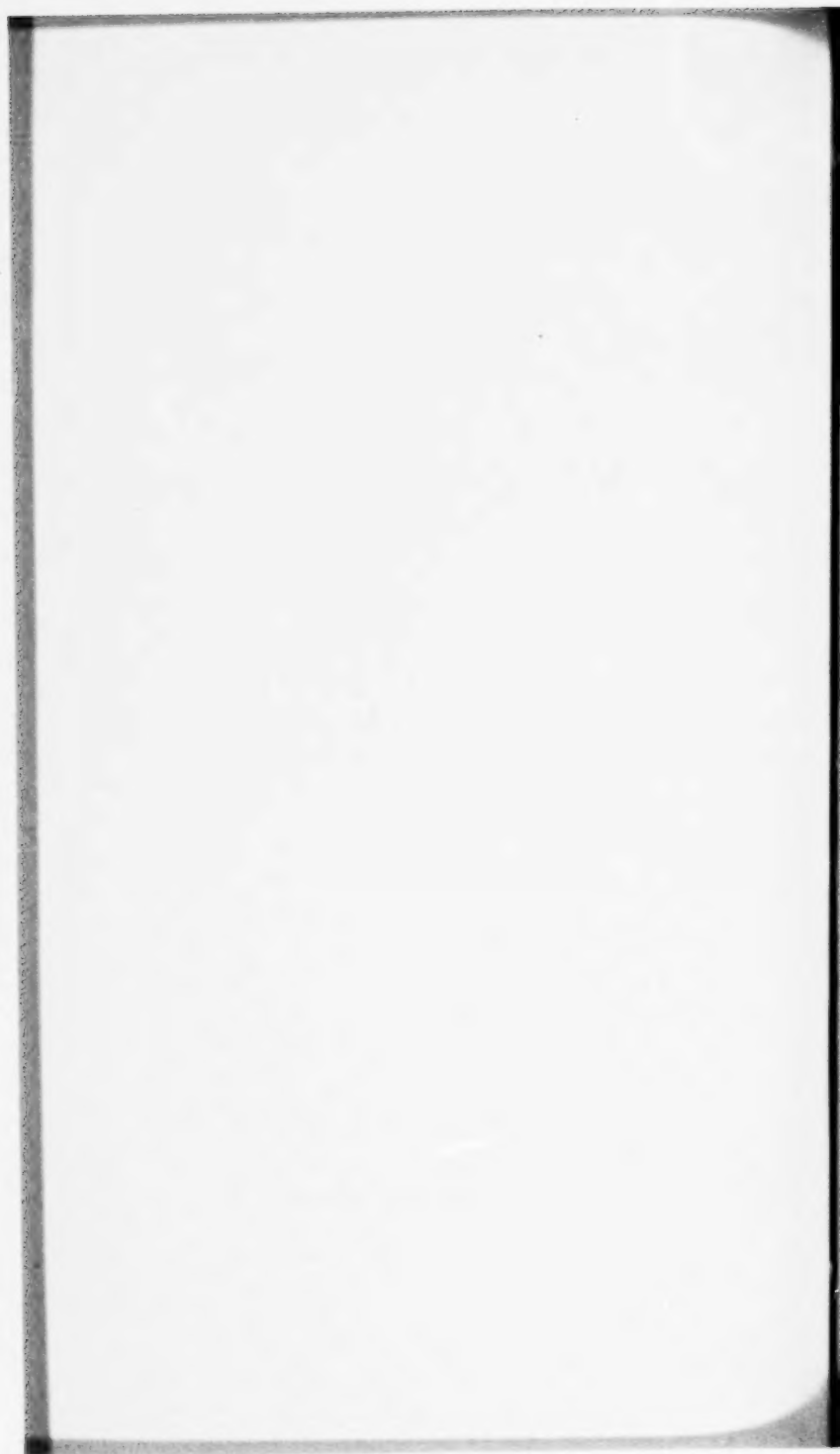
vs.

EMMA B. JOHNSON, AS ADMINISTRATRIX OF THE GOODS, CHATTELS, AND CREDITS WHICH WERE OF JOHN B. JOHNSON, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 In United States District Court, Eastern District of New York

EMMA B. JOHNSON, AS ADMINISTRATRIX OF THE GOODS,  
chattels, and credits which were of John B. John-  
son, deceased, plaintiff

*against*

HENRY P. KEITH, LATE COLLECTOR OF UNITED STATES  
internal revenue for the first collection district of  
New York, defendant.

No. 173<sup>c</sup> Law

*Writ of error*

UNITED STATES OF AMERICA, *ss.*:

*The President of the United States of America to the judges of  
the District Court of the United States for the Eastern District of  
New York, greeting:*

Because in the record and proceedings, as also in the rendition of  
the judgment of a plea which is in the District Court, before you, or  
some of you, between Emma B. Johnson as administratrix of the goods,  
chattels, and credits of John B. Johnson, deceased, plaintiff, and Henry  
P. Keith, late collector of United States internal revenue of the First

2 Collection District of the State of New York, defendant, a  
manifest error hath happened, to the great damage of the  
said defendant, as is said and appears by the petition and  
complaint of the defendant, we, being willing that such error, if  
any hath been, should be duly corrected, and full and speedy justice  
be done to the parties aforesaid in this behalf, do command you,  
if judgment therein be given, that then under your seal, distinctly  
and openly, you send the record and proceedings aforesaid, with  
all things concerning the same, to the judges of the United States  
Circuit Court of Appeals for the Second Circuit, at the city of  
New York, together with this writ, so that you have the same at  
the said place, before the judges aforesaid, on the 24th day of April,  
1924, that the record and proceedings aforesaid being inspected,  
the said judges for the United States Circuit Court of Appeals for  
the Second Circuit may cause further to be done therein, to correct  
that error, what of right and according to law and custom of the  
United States ought to be done.

Witness the honorable William Howard Taft, Chief Justice of  
the United States, this 25th day of March, in the year of our Lord  
one thousand nine hundred and twenty-four and of the independence  
of the United States one hundred and forty-eighth.

PERCY G. B. GILKES,

*Clerk of the District Court for the United States*

*for the Eastern District of New York.*

The foregoing writ is hereby allowed the 25th day of March,  
1924.

MARCUS B. CAMPBELL,

*United States Judge.*

## In United States District Court

[Title omitted.]

## Summons

*To the above-named defendant:*

You are hereby summoned to answer the complaint in this action, and file your answer and serve a copy thereof on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the honorable Edwin L. Garvin and Marcus B. Campbell, judges of the District Court of the United States for the Eastern District of New York, at the borough of Brooklyn, this 10th day of March, in the year one thousand nine hundred and twenty-three.

[L. S.]

PERCY G. B. GILKES,

*Clerk.*

By J. G. COCHRAN,

*Deputy Clerk.*

SIDNEY V. LOWELL,

*Plaintiff's Attorney.*

Office and post-office address, 189 Montague Street, borough of Brooklyn, New York City, New York.

## In United States District Court

*Bill of complaint*

[Title omitted.]

The plaintiff complains and alleges as follows:

First. That John G. Johnson died at Kings County, New York, March twenty-fourth, nineteen hundred and seventeen. He had always been a born citizen of the United States and also was for fifty years prior to that date a resident and citizen of the State of New York; that he died intestate; that on the twenty-sixth day of March, nineteen hundred and seventeen, letters of administration upon the goods, chattels, and credits which were of said John G. Johnson were issued solely to the plaintiff by the Surrogate's Court of Kings County in the State of New York and that the same now are and ever have been in full force and effect.

Second. That the defendant, Henry P. Keith, at the dates and times hereinafter referred to herein was collector of internal revenue of the United States for the first district, in the State of New York and acting as such; that he is now a resident in the Eastern District Court District of the State of New York.

Third. That on the twenty-eighth day of March, nineteen hundred and eighteen, plaintiff made and filed with the defendant, Henry

P. Keith, as collector of internal revenue of the United States for the first collection district of the State of New York, her return as administratrix of the estate of John G. Johnson, deceased, of the income received by her as such administratrix for the period of the year nineteen hundred and seventeen between March twenty-six and December thirty-first, inclusive; that she was forbidden by the said collector and by the rules of the Treasury Department of the United States and its Commissioner of Internal Revenue to make any deductions in such return for inheritance taxes paid by her as such administratrix out of the income of the said estate or otherwise and was required to make a return of income without any such deduction and to pay the full tax upon all the income that she had received without any deduction or offset or consideration of such outgo for taxes to said collector, and she was threatened by said collector with the distraint and sale of the decedent's estate in her hands—a large property—if she failed to make such return and payment.

That as administratrix aforesaid during the year nineteen hundred and seventeen at the portion of the year aforesaid she had been obliged to pay inheritance taxes levied upon the estate in her hands and being against herself as such administratrix as follows:

1917:		
June 27.	Inheritance tax paid State Colorado.....	\$286. 72
June 29.	Inheritance tax paid State West Virginia.....	232. 59
Sept. 4.	Inheritance tax paid State Kentucky.....	208. 24
Sept. 20.	Inheritance tax paid State New York.....	233, 044. 20
Sept. 20.	Inheritance tax paid State New Jersey.....	39, 201. 18
		273, 092. 93

And that she also, on September 21st and 22nd, nineteen hundred and seventeen, paid a tax on bonds to the State of New York amounting to one thousand one hundred forty-five dollars which she was entitled to deduct from said income, but was not allowed by said collector so to do.

1917—Sept. 21 & 22nd, bond tax paid State New York..... \$1, 145. 00

Such inheritance taxes arose because of stocks held by decedent at his death in corporations organized under the laws of each of said States in value greatly exceeding said taxes in each instance.

That such inheritance taxes so paid far exceed the whole income received by plaintiff for the said portion of the year nineteen hundred and seventeen for which she made return of income, the entire income received without reduction for said taxes as returned and adjusted being one hundred sixty-four thousand nine hundred and fifty-eight dollars (\$164,958). (Such return was for part of a year, because the decedent died when the year was partly run, and a separate return was made for what income he received.)

That the amount of income tax upon said sum of one hundred and sixty-four thousand nine hundred and fifty-eight dollars

(\$164.958) demanded by the defendant as collector aforesaid was thirty thousand nine hundred eighty-five and 53/100 dollars (\$30,985.53).

Fourth. That solely to avoid the imposition of penalties in case of nonpayment of said income tax and of distraint and sale of goods, chattels, and credits that were of said decedent, John G. Johnson, in her hands as administratrix thereof, that on the thirty-first day of May, nineteen hundred and eighteen, the plaintiff paid said \$30,985.53 to said defendant as collector aforesaid for said tax; but the same being paid under her protest that there was no income whatever owing to the disbursements for inheritance taxes aforesaid and that no tax or other sum was due the United States of America or said collector from her as such administratrix on account of income for the year aforesaid or any part thereof. That the same was demanded, collected, and received by said defendant from plaintiff without lawful authority so to do, namely, thirty thousand nine hundred and fifty-eight and 53/100 dollars (\$30,958.53).

Fifth. That on June tenth, nineteen hundred and twenty-  
9 one, the plaintiff, as administratrix aforesaid, made and filed with the collector of internal revenue for the United States of America for the first collection district of the State of New York a claim in writing for the refunding to her of the amount so paid (with other amounts to which she was entitled as stated in such claim), the same to be verified by him in the usual way as to payments and to be forwarded by him in the usual course to the Commissioner of Internal Revenue, which verification be duly made in said claim, and forwarded the said claim as verified to said commissioner on the eighth day of July, nineteen hundred and nineteen; that the said claim for refund and repayment so filed was duly made in all respects in accordance with the provision of law and the regulations of the United States Treasury Department established in relation of such matters; that said commissioner has made no decision upon said claim, though a much longer time than six months has elapsed since the filing of said claim and its being forwarded by the collector aforesaid to him.

Sixth. That no part of the sum asked for in the claim aforesaid or any part of the said income tax for the said part of the said year nineteen hundred and seventeen has ever been refunded or repaid or received by plaintiff; and that the whole sum thereof, in particular the sum of thirty thousand nine hundred fifty-eight and 53/100 dollars before set forth, is now due, owing, and unpaid to the plaintiff from the defendant with interest from March twenty-eighth, nineteen hundred and eighteen.

Seventh. That this is a suit of a civil nature at common law  
10 and that the cause of action stated herein arose under the laws of the United States providing for internal revenue and arose in the Eastern United States District Court, District of the State of New York.



Wherefore the plaintiff demands judgment against said defendant for the sum of thirty thousand nine hundred fifty-eight and 53/100 dollars (\$30,958.53) and interest from May thirty-first, nineteen hundred and eighteen, being a sum demanded of her by and collected and received by the defendant as collector of internal revenue as and for an income tax as heretofore set forth and for her costs of this action.

SIDNEY V. LOWELL,

*Attorney for Plaintiff.*

Sworn to by Emma B. Johnson; jurat omitted in printing.

11 In United States District Court

Title omitted.

*Answer*

Filed March 7, 1923

The defendant above named, by Ralph C. Greene, United States Attorney for the Eastern District of New York, his attorney, answering the complaint of the plaintiff herein, alleges and respectfully shows to the court as follows:

First. The defendant denies each and every allegation contained in said complaint in paragraphs marked or numbered "Third," except that the defendant admits that the plaintiff was required to and did file a return of income received by her as such administratrix for the period of the year 1917 between March 26th and December 31st, inclusive, said return being filed in the office of the collector of internal revenue for the first collection district of the State of New York.

12 Second. The defendant denies each and every allegation contained in paragraph of said complaint marked or numbered "Fourth."

Third. The defendant denies each and every allegation in paragraph of said complaint marked or numbered "Fifth," except that the defendant admits that the plaintiff made and filed with him a certain paper writing claiming to be a request for refund of taxes.

Fourth. The defendant denies each and every allegation contained in paragraph of said complaint marked or numbered "Sixth."

Wherefore defendant demands judgment dismissing the complaint of the plaintiff herein, together with costs and disbursements of this action.

RALPH C. GREENE,

*United States Attorney.*

*Eastern District of New York.*

Office & post-office address:

Room No. 211 P. O. Bldg., Brooklyn, New York.

13 Sworn to by Guy O. Walser; jurat omitted in printing.

14 In United States District Court

[Title omitted.]

*Answer*

Filed Apr. 18, 1923

The defendant above named by Ralph C. Greene, United States Attorney for the Eastern District of New York, answering the complaint of the plaintiff herein, alleges and respectfully shews to the court as follows:

First. That the defendant denies each and every allegation contained in paragraph of said complaint marked or numbered "Third," except that the defendant admits that on or about March 28th, 1918, the plaintiff made and filed with him as collector of internal revenue for the first collection district in the State of New York a paper writing purporting to be the return of the complainant as  
15 administratrix of the estate of John B. Johnson, deceased, of the income received by her as such administratrix for the period of the year 1917, between March 26th and December 31st, inclusive.

Second. The defendant denies each and every allegation contained in paragraph of said complaint marked or numbered "Fourth," except that the defendant admits that the complainant paid to him as such collector on May 31st, 1918, the sum of \$30,985.53.

Third. The defendant denies each and every allegation contained in paragraph of said complaint marked or numbered "Fifth," except that the defendant admits that on or about June 10, 1921, the complainant filed with him as such collector a paper writing purporting to be a claim for refund.

Fourth. The defendant denies each and every allegation contained in paragraph of said complaint marked or numbered "Sixth," except that the defendant admits that he has not refunded to the plaintiff the sum of \$30,985.53.

Wherefore defendant demands judgment dismissing the complaint of the plaintiff herein, together with costs and disbursements.

RALPH C. GREENE,  
*United States Attorney,*  
*Eastern District of New York.*

Room No. 211, P. O. Bldg., Brooklyn, New York.

16 Sworn by Henry P. Keith; jurat omitted in printing.

17

In United States District Court

*Stipulation withdrawing answers*

May 15, 1923

[Title omitted.]

It is hereby stipulated and agreed that the answers for the defendant herein, which have been made and served in this action, be withdrawn and that the defendant have three days within which to serve a demurrer in the action.

SIDNEY V. LOWELL,  
*Plaintiff's Attorney.*  
RALPH C. GREENE, Sr.,  
*U. S. Atty.*

18

In United States District Court

[Title omitted.]

*Demurrer*

Filed May 21, 1923

The defendant above named, by Ralph C. Greene, United States attorney for the Eastern District of New York, hereby demurs to the complainant of the plaintiff herein on the ground that the same does not state facts sufficient to constitute a cause of action.

Dated May 15, 1923.

RALPH C. GREENE,  
*United States Attorney,*  
*Eastern District of New York.*

Room No. 211 Federal Bldg., Brooklyn, New York.

19

In United States District Court

*Notice of motion for judgment*

May 26, 1923

[Title omitted.]

Please to take notice that I will move this court upon the pleadings in this action being the plaintiff's complaint and the defendant's demurrer thereto for judgment in favor of the plaintiff as demanded in the complaint at a term of this court for motions to be held at the United States post office building on Washington Street, Brook-

lyn Borough, city of New York, upon the sixth day of June next, at the opening of court on that day or as soon thereafter as counsel can be heard.

SIDNEY V. LOWELL,  
*Plaintiff's Attorney.*

TO RALPH C. GREENE, Esq.,  
*United States Attorney, Eastern District of New York,*  
*Defendant's Attorney.*

20

In the United States District Court

*Order for Judgment on Demurrer*

September 24, 1923

[Title omitted.]

This action being at issue in this court upon the complaint of the plaintiff and the Demurrer thereto on the part of the defendant both duly filed in this court and a motion for judgment on due written notice to the defendant's attorney having been duly made by the plaintiff, the same being made upon the said pleadings and such judgment to be in favor of the plaintiff as demanded in her

said complaint, and said motion having been called for  
21 hearing pursuant to said notice before a term of this court for motions held by Hon. Marcus B. Campbell, a judge of this court, on the sixth day of June, 1923, the return day of said notice, and the hearing on such motion having been duly postponed from time to time to June 20th, 1923, and on said latter date counsel on both sides having been duly heard in such motion both orally and on briefs submitted to the court; Sidney V. Lowell, plaintiff's attorney, having been so heard for the plaintiff and Ralph C. Green, defendant's attorney, for the defendant, and due deliberation on such motion having been had by this court and said motion having been decided in favor of the plaintiff.

Now on motion of said plaintiff's attorney it is ordered that the said motion of the plaintiff for judgment on the pleadings in this action as demanded in the complaint, being for judgment in her favor against the defendant for the sum of thirty thousand nine hundred fifty-eight dollars and fifty-three cents, with interest from May 31st, 1918, with her costs of this action, be and the same is hereby granted. And the clerk of this court shall enter judgment accordingly.

MARCUS B. CAMPBELL,  
*U. S. D. C. J.*

22

Please to take notice that the order of which the within is a copy was duly filed and entered in the office of the United States District Court, Eastern District of New York, at the Post

Office & Court Building, on Washington Street, on the 26th day of September, 1923.

Dated, Sept. 24th, 1923.

SIDNEY V. LOWELL,

Office and P. O. address, 189 Montague Street, borough of Brooklyn, New York.

To Hon. RALPH C. GREENE,  
*Attorney for Defendant.*

23 In United States District Court

[Title omitted.]

*Judgment*

September 26, 1923

This action having been at issue in this court upon the complaint of the plaintiff and the demurrer thereto on the part of the defendant, both having been duly filed in this court, and a motion for judgment on due written notice to the defendant's attorney having been duly made by the plaintiff, the same being made upon the said pleadings, and such judgment to be in favor of the plaintiff as demanded in her said complaint, and said motion having been duly heard, both sides appearing (the plaintiff by Sidney V. Lowell, her attorney, and the defendant by Ralph C. Greene, her attorney) before Hon. Marcus B. Campbell, a judge of this court, at a term of this court for motions in the June term, 1923, at Kings County, New

24 York; and a written decision by said judge having been made therein in favor of the plaintiff, and an order having been made by this court following the said decision on the motion aforesaid at a term thereof for motions held by the said judge, entered in this court, September 24th, 1923, directing "that the said motion of the plaintiff for judgment on the pleadings in this action as demanded in the complaint being for judgment in her favor against the defendant for the sum of thirty thousand nine hundred and fifty-eight dollars and fifty-three cents, with interest from May 31st, 1918, with her costs of this action, be and the same is hereby granted; and that the clerk of this court shall enter judgment according."

And the plaintiff's costs having been duly adjusted on notice to the defendant's attorney at the sum of

Now it is hereby adjudged and decreed that the plaintiff, Emma B. Johnson, as administratrix of the goods, chattels, and credits which were of John B. Johnson, deceased, have judgment against the defendant, Henry P. Keith, late collector of United States internal revenue for the first collection district of the State of New York, for and in the sum of forty-one thousand four hundred and

forty-three dollars and ten cents principal and interest and the sum of thirty-one dollars and fifty cents for her costs of this action, amounting together to the sum of forty-one thousand four hundred and sixty-four dollars and sixty cents.

Judgment entered this 26th day of September, 1923.

PERCY G. B. GILKES,

*Clerk.*

By JOHN A. LEAVENS,

*Acting Clerk.*

25 Please to take notice that the judgment, of which the within is a copy, was duly filed and entered in the office of the clerk of the United States District Court for the Eastern District of New York in U. S. Post Office & Court Building on Washington Street, Kings County, on the 26th day of September, 1923.

Dated, September 26th, 1923.

SIDNEY V. LOWELL,

*Attorney for Plaintiff.*

Office and P. O. Address, 189 Montague Street, Borough of Brooklyn, New York.

26 In United States District Court

[Title omitted.]

*Opinion*

Sept. 19, 1923

SIDNEY V. LOWELL, attorney for plaintiff; BENJAMIN MAHLER, of counsel.

RALPH C. GREENE, United States Attorney; NELSON T. HARTSON, Solicitor of Internal Revenue, of counsel.

CAMPBELL, J.:

This action comes before the court on a motion for judgment upon the pleadings.

It was brought by the plaintiff against the defendant to recover the sum of \$30,985.53, with interest, alleged to have been illegally and erroneously assessed and collected as an income tax upon the estate of John G. Johnson, deceased, under the provisions of the revenue act of 1916, as amended by the revenue act of 1917.

27 The complaint alleges: That John G. Johnson died a resident of Kings County and a citizen of the State of New York, intestate, on the 24th day of March, 1917, and that letters of administration were granted upon his estate to the plaintiff; that the defendant, at the times referred to in the complaint, was the collector of internal revenue of the United States for the first district of New York, and acting as such, and was a resident of this district. That the plaintiff, on March 28, 1918, filed with the defendant her

return, as administratrix as aforesaid, of the income received by her as such administratrix from March 26th to December 31, 1917, both dates inclusive, but that she was not allowed to make any deduction in such return for inheritance tax paid by her as such administratrix out of the income of said estate or otherwise during the year 1917. That under protest and duress the plaintiff paid the following inheritance taxes:

June 27, 1917, to the State of Colorado.....	\$286. 72
June 29, 1917, to the State of West Virginia.....	232. 59
Sept. 4, 1917, to the State of Kentucky.....	208. 24
Sept. 20, 1917, to the State of New York.....	233, 044. 20
Sept. 20, 1917, to the State of New Jersey.....	39, 201. 18
Making a total of.....	273, 002. 93

That also, on Sept. 21 and 22, 1917, said administratrix paid 28 to the State of New York a tax on bonds belonging to the estate in the amount of \$1,145; that said inheritance taxes so paid far exceeded the whole income received by the plaintiff from the said estate from March 28th to December 31st, 1917, the entire income received without reduction of said taxes as returned and adjusted being \$164,958; that the amount of income tax upon said sum of \$164,958, demanded by the defendant as collector and paid by the plaintiff as administratrix, was \$30,985.53; that such payment was made solely to avoid the imposition of penalties in case of nonpayment of said income tax and distraint and sale of the goods, chattels, and credits that were of said estate, and that said payment was made under protest, and that the same was demanded, collected, and received by the defendant without lawful authority so to do; that on June 10, 1921, the plaintiff made and filed with the collector of internal revenue for the first collection district of New York a claim in writing for refund of the amount so paid, the same after verification to be forwarded by said collector to the Commissioner of Internal Revenue, and that said collector made such verification and forwarded said claim to the commissioner on June 8, 1919. That said claim for refund was made in all respects in accordance with the laws and regulations of the department, that said commissioner has made no decision upon said claim, and that more than six months have elapsed since the said claim was forwarded by the collector to the said commissioner; that no part of the said sum has been repaid to the plaintiff, and the necessary 29 allegations showing the jurisdiction of this court.

To said complaint the defendant has demurred on the ground that the same does not state facts sufficient to constitute a cause of action.

The sole question which has been argued before me is whether the amount paid to the State of New York for inheritance tax should have been allowed as a deduction in determining the income tax, if any, to be levied for the described portion of the year 1917. X

The plaintiff did not deem it necessary to argue for the allowance as a deduction of the amounts paid for inheritance taxes due the

other States, as the amount paid to the State of New York alone was far in excess of the amount of said income tax, and if the same was allowed as a deduction would more than wipe out the whole income tax.

Section 2 (b) of the revenue act of 1916 (39 Stat. 756) provides:

"Income received by estates of deceased persons during the period of administration or settlement of the estate, shall be subject to the normal and additional tax and taxed to their estates, and also such income of estates or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests, and income held for future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be: Provided, That where the income is to be distributed annually or regularly between existing heirs or legatees, or beneficiaries the rate of tax and method of computing the same shall be based in each case upon the amount of the individual share to be distributed."

"Such trustees, executors, administrators, and other fiduciaries are hereby indemnified against the claims or demands of every beneficiary for all payments of taxes which they shall be required to make under the provisions of this title, and they shall have credit for the amount of such payments against the beneficiary or principal in any accounting which they make as such trustees or other fiduciaries."

Section 5 (a) (3) of the revenue act of 1916 (39 Stat. 756), as amended by section 1201 of the revenue act of 1917 (40 Stat. 300) provides:

"SEC. 5. That in computing net income in the case of a citizen or resident of the United States—

"(a) For the purpose of the tax there shall be allowed as deductions—

"Third. Taxes paid within the year imposed by the authority of the United States (except income and excess profits taxes) or its Territories, or possessions, or any foreign country, or by the authority of any State, county, school district, or municipality, or other taxing subdivision of any State, not including those assessed against local benefits."

From the foregoing quotations from the statutes it appears that all taxes paid by the estate during the year, except income and excess profit taxes and local improvement assessments, were allowable as deductions, and as inheritance taxes did not come within these exceptions they should, if paid by the estate, have been allowed as deductions, in which event no income tax would have been assessed,



as the amount paid for the New York transfer tax within the year exceeded the income tax assessed. *United States v. Woodward*, 256 U. S., 632.

The income reported and on which the tax was assessed was the income received during the administration of the estate, and was not income reported by a beneficiary or income to be distributed annually between persons entitled thereto.

The question presented therefore is, were the inheritance taxes alleged in the complaint in this action to have been paid to the State of New York imposed upon and paid by the estate and therefore allowable to it as a deduction, or were they, as the defendant contends, imposed upon and payable by the beneficiary and not by the estate, but in the instant case paid by the plaintiff for the benefit of the beneficiaries and allowable as deductions to the beneficiaries only and not to the estate.

The inheritance tax assessed by the State of New York 32 under the law as it existed both before and after the amendment of 1916 (now known as the transfer tax law) is not a tax on the property, in the ordinary sense of the term, but upon the right to dispose of the property, and it is not until it has yielded its contribution to the State that it becomes the property of the beneficiary.

*United States v. Perkins*, 163 U. S. 625;

*Prentiss v. Eisner*, 260 Fed. 589, *affd.* C. C. A., 267 Fed. 16; certiorari for appeal refused, 254 U. S. 647;

*Matter of Swift*, 137 N. Y. 77;

*Matter of Merriam*, 141 N. Y. 479;

*Matter of Sherman*, 179 App. Div. 497; *affd.* 223 N. Y. 540;

*Matter of Hamlin*, 185 App. Div. 153; *affd.* 226 N. Y. 407;

*Matter of Hazard*, 188 App. Div. 869.

The New York inheritance tax is not imposed upon the beneficiary and is not payable by the beneficiary.

*United States v. Perkins* (*supra*);

*Matter of Swift* (*supra*);

*Matter of Merriam* (*supra*).

While there are variances between the Federal estate tax and the New York transfer tax laws in respect to rates charged, the exemptions permitted and the deductions authorized, as well as in other particulars, the intrinsic nature and purpose of the tax is the same in each case and has been so held by the New York State 33 court, which allowed the transfer tax paid by an estate to be deducted in determining the estate's income tax under the State laws.

*People ex rel. Home Trust Co. v. Law et al.*, State Tax Commissioner, 198 N. Y. Supp., 710, *affd.* by the N. Y. Court of Appeals, without opinion, N. Y. Law Journal, July 14, 1923.

There are but two entities to be considered in determining upon whom the tax is imposed and by whom it is payable, to wit, the

estate and the beneficiary, and the cases hereinbefore cited show that the New York transfer tax is the same in essentials as the Federal estate tax, and also that the New York transfer tax is not imposed upon or payable by the beneficiary; therefore it logically follows that the New York transfer tax is imposed upon and payable by the estate.

The New York transfer tax alleged in the complaint was paid by the estate and not by the beneficiary, and therefore could not have been claimed by the beneficiary as a deduction in determining his or her income tax, but should have been allowed as a deduction to the estate. The amount paid for the New York transfer tax having been greater than the whole income of the estate during the time specified, no income tax should have been imposed on the estate.

The demurrer of the defendant is overruled, and the motion of the plaintiff for judgment on the pleadings is granted.

Settle on notice.

U. S. D. J.

34

In United States District Court

*Petition for writ of error*

March 25, 1924

[Title omitted.]

*To the Honorable Judges of the United States District Court for the Eastern District of New York:*

The defendant by his petition herein respectfully shows to the court that by the record and proceedings had herein in the above-entitled cause, and particularly by the decision and judgment of this court entered herein on September 26, 1923, overruling the demurrer interposed by the defendant and granting judgment on the pleadings in favor of the plaintiff and against the defendant for the sum of \$39,058.53, with interest from May 31, 1918, and costs, manifest errors hath happened to the great damage and prejudice of the defendant, all of which more fully appear in the assignment of errors filed with this petition.

35 Wherefore the defendant prays that a writ of error may issue in behalf of the defendant out of the United States Circuit Court of Appeals for the Second Circuit, directed to the United States District Court for the Eastern District of New York, to the end that said errors may be corrected according to law, and for such other and further relief as may be just.

RALPH C. GREENE,

*United States Attorney, Eastern District of N. Y.,*

*Attorney for the Defendant.*

36 In United States District Court

[Title omitted.]

*Order allowing writ of error*

March 25, 1924

Upon motion of Ralph C. Greene, United States attorney for the Eastern District of New York, attorney for the defendant, and on the petition herein,

Ordered that a writ of error be, and hereby is, allowed and that the same be issued as prayed for, and it is further

37 Ordered that at any time within ninety days the defendant may amend the assignments or error filed with the petition for said writ of error, and it is further

Ordered that the September term of this court be and hereby is extended ninety days from the date hereof for all purposes of this action.

MARCUS B. CAMPBELL,  
*District Judge.*

In United States District Court

[Title omitted.]

*Assignments of error*

Now comes the defendant herein by Ralph C. Greene, United States Attorney for the Eastern District of New York, attorney for the defendant, and makes and files the following assign-  
38 ment of errors, upon which the defendant will rely upon the prosecution of the writ of error to review the judgment of the court in the above-entitled cause, and alleges:

First. That the court erred in overruling the demurrer interposed by the defendant herein and particularly because the complaint herein failed to state a cause of action against the defendant.

Second. That the court erred in granting judgment in favor of the plaintiff and against the defendant on the pleadings, and particularly because of the court's ruling that the amount paid by the plaintiff to the State of New York for inheritance tax should have been allowed as a deduction in determining the income tax to be paid by the plaintiff.

Third. That the court erred in overruling the demurrer of the defendant and granting judgment for the plaintiff on the pleadings and particularly because the said ruling, order, and judgment are contrary to law.

Wherefore the defendant prays that the said order and judgment of this court be reversed.

RALPH C. GREENE,  
*United States Attorney, Eastern District of New York,*  
*Attorney for the Defendant.*

39 [Citation in usual form omitted in printing.]

40 In United States District Court

[Title omitted.]

*Stipulation re transcript of record*

It is hereby stipulated that the foregoing contains a true and complete transcript of the record and proceedings had in this court in the above-entitled cause, as the same remain of record and on file in the office of the clerk thereof, and that the clerk may certify the same, and that the same be filed as the record on appeal herein.

April , 1924.

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*United States Attorney, E. D. N. Y.,*  
*Attorney for Defendant.*

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*Attorney for Plaintiff.*

41 In United States District Court

[Title omitted.]

*Order to file transcript of record*

The foregoing printed record is hereby ordered on file for use by the clerk for certification of a record in lieu of the original papers.

April , 1924.

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*U. S. D. J.*

42 In United States District Court

[Title omitted.]

*Clerk's certificate*

I, Percy G. B. Gilkes, clerk of the District Court of the United States for the Eastern District of New York, do hereby certify that the foregoing is a correct transcript of the record and proceedings of the said District Court in the above-entitled action as agreed upon by the parties.

In witness whereof I have caused the seal of said court to be hereunto affixed, at the city of New York, in the United States District Court, at the borough of Brooklyn, the city of New York, in the Eastern District of New York, this            day of April, 1924.

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*Clerk.*

43 In United States Circuit Court Appeals, for the Second  
Circuit

HENRY P. KEITH, LATE COLLECTOR OF UNITED STATES INTERNAL REVENUE for the first collection district of New York, plaintiff in error,

*against*

EMMA B. JOHNSON, AS ADMINISTRATRIX OF THE GOODS, CHATTELS, AND credits which were of John B. Johnson, deceased, defendant in error

*Stipulation re printing of tax returns, etc.*

Apr. 7, 1924

It is hereby stipulated and agreed by and between the attorneys for the respective parties in the above-entitled action that the printing of the tax returns, claim for their refund, and the correspondence thereon shall be dispensed with as an unnecessary expense in the printing of the transcript of the record on appeal in this case, and that in lieu thereof the parties agree and concede that the amount paid by the plaintiff and the amount of refund demanded were as set forth in the complaint, that the payment was made under protest and the refund was duly demanded, and that the only question to be decided was whether a transfer tax paid to the State of New York is such a tax as should properly have been allowed as a deduction in computing the net income of the estate of John G. Johnson, deceased, for the period beginning March 24, 1917, and ending December 31, 1917, under the provisions of the revenue act of 1916 as amended and the revenue act of 1917 and any other United States revenue laws, if any, in force and bearing upon the question at the time mentioned in the complaint.

RALPH C. GREENE,  
*United States Attorney E. D. N. Y.,*  
*Attorney for Defendant.*  
SIDNEY V. LOWELL,  
*Plffs. Atty.*

## 45 In United States Circuit Court of Appeals

[Title omitted.]

*Opinion*

Before HOUGH and MANTON, C. JJ., and LEARNED HAND, D. J.

Writ of error to the District Court for the Eastern District of New York, Campbell, D. J., upon a judgment on demurrer for the plaintiff in an action at law.

Nelson T. Hartson for the plaintiff in error (defendant below).

B. Mahler and Harrison Tweed for the defendant in error (plaintiff below).

LEARNED HAND, D. J.: The action is to recover from the collector of taxes the amount of a tax paid under protest. The defendant demurred to the complaint; the district judge overruled the demurrer and gave judgment for the plaintiff.

The case was thus: The defendant died on March twenty-fourth, 1917, and the plaintiff, his administratrix, filed an income 46 tax return for the period of her administration in that year, from March 26th to December 31st, deducting the inheritance tax paid to the State of New York, which extinguished the whole income. The deduction was disallowed, and the plaintiff was taxed \$30,985.53, which she was forced to pay. For the purposes of the case it is agreed that all the intestate's estate may be regarded as personal property.

Section 2(b) of the Federal revenue act of 1916 declares that the income of decedent's estates shall be subject to the income tax "and taxed to their estates \* \* \* to be assessed to the executor or administrator." Section five of the same act provides that "in computing the net income in the case of a citizen or resident of the United States" there may be deducted "taxes paid within the year imposed \* \* \* by the authority of any State," which must mean imposed on the citizen in question. Since there is no special section providing for deductions allowed to decedents' estates, this section must cover these as well as living persons. As section 2(b) assesses the tax against the executor personally, he is the "citizen or resident" of section 5 who may deduct the State tax. The case at bar, therefore, turns on whether the New York inheritance tax is "imposed" on him. At least, if it is so imposed, section 5 covers him. That is a question of New York law, and we are bound by the decisions of the New York Court of Appeals on that question.

The New York inheritance tax is imposed by section 220 of the tax law on "the transfer of property." This is ambiguous in respect of its incidence, but section 224 enacts that the tax shall be "a lien upon the property transferred and the executors \* \* \* of every estate so transferred shall be personally liable for such 47 tax until its payment." We think that in principle under this provision the tax is "imposed" on the executor, and that it was so ruled in *Home Ins. Co. v. Law*, 204 App. Div. 590, affirmed in 236 N. Y. 607. There the New York inheritance tax was allowed as a deduction from the New York income tax upon a decedent's estate, under section 360 (subdivision 2), which follows verbatim section five of the Federal revenue act of 1916. Section 365 (subdivision 2) of the New York income tax law requires the executor to make the return and section 369 makes him "subject to all the provisions of this article which apply to taxpayers," one of which (section 351-b) makes the tax a debt against the taxpayer. While the Court of Ap-

peals wrote no opinion, it seems to us necessary to assume that they regarded the inheritance tax as "imposed" under section 360 (subdivision 2), because that was the only section which allowed the deduction. If so "imposed," it must be a duty in personam, because the income tax, as has been shown, is a debt, and the inheritance tax, in form also a debt, could not well be deducted unless it was a debt likewise.

Our own decision in *Prentiss v. Eisner*, 267 F. R. 16, following *U. S. v. Perkins*, 163 U. S. 625, compels the same conclusion. There we held that a legatee might not deduct the New York inheritance tax from his income tax. If neither he nor the executor may do so, the tax must be solely in rem, a conclusion effectively answered by section 224 above quoted. The defendant insists that the contrary is true, the New York inheritance tax being levied on one entity and the Federal income tax on another, each being an "estate" of the decedent differently conceived. It is true that the language of the statutes is not wholly clear, but we prefer to follow the customary categories while that course is left open to us. An  
48 / executor is vested with the personality of the decedent, and here we are dealing only with personality. While it is true that the New York inheritance tax is made a lien, that may well be only for security, and in any event personal taxes normally create duties in personam, and the executor or administrator is the natural person on whom to levy them.

*U. S. v. Woodward*, 256 U. S. 653, in effect holds the same thing. There the question was whether the Federal inheritance tax was deductible from income under section 214 of the act of 1918, which was the same as section five of the act of 1916. The Federal inheritance tax was by section 201 of the act of 1916 imposed upon the transfer of the "net estate of every decedent." By section 205 the executor must file the return, by section 207 he must pay the tax, and by section 209 it is made a lien. Thus the Federal inheritance tax is like the New York inheritance tax unless there is a difference between section 207 of the act of 1916 and section 224 of the New York tax law. We think that to say that the executor "shall pay" the tax is the same thing as to say that he shall be "personally liable" for it.

*N. Y. Trust Co. v. Eisner*, 256 U. S. 350, held that the New York inheritance tax was not a deduction in calculating the Federal inheritance tax. That case turned on the meaning of section 203 (a) (1) of the act of 1916, especially the words "such other charges against the estate as are allowed by the laws of the jurisdiction \* \* \* under which the estate is being administered." It is quite true that the reason given was that inheritance taxes were "taxes on the right of individual beneficiaries" and for that reason not "charges that affect the estate as a whole." Literally the first clause quoted contradicts *U. S. v. Perkins*, *supra*, but the  
49 cases may be reconciled by understanding that the "charges" intended are only such as are imposed on the executor as

successor stricti juris, like the income tax itself, and not such as arise because he must distribute the estate, as is the inheritance tax. There was reason to impute such a distinction to Congress, since the income tax is collected yearly, while the inheritance tax is levied once and for all. Both sovereigns might well insist upon an exaction on the whole estate for the privilege of its transfer.

We express no opinion as to the result in the cases of realty where the executor is not the successor, or even in the case of specific legacies.

Judgment affirmed.

50 In United States Circuit Court of Appeals

[Title omitted.]

*Judgment*

Filed Nov. 28, 1924

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, affirmed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

C. M. H.

M. T. M.

52 In United States Circuit Court of Appeals

*Clerk's certificate*

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 51, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Henry P. Keith, as collector, etc., plaintiff in error, against Emma B. Johnson, as admx., etc., defendant in error, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York in the Second Circuit, this 20th day of January, in the year of our Lord one thousand nine hundred and twenty-five and of the independence of the said United States the one hundred and forty-ninth.

[SEAL.]

WM. PARKIN, *Clerk.*



In Supreme Court of the United States

*Order allowing certiorari*

Filed March 23, 1925

On petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Second Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this court that the said petition be, and the same is hereby granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

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